IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9427 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE K.G.BALAKRISHNAN and

MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RAM KIRPAL

Versus

UNION OF INDIA

Appearance:

MR Hitendra Kapoor for MR JJ YAJNIK for Petitioner

MR JD AJMERA for Respondent No. 1, 2

CORAM : MR.JUSTICE K.G.BALAKRISHNAN and

MR.JUSTICE J.M.PANCHAL

Date of decision: 16/03/98

ORAL JUDGEMENT {Per : J. M. Panchal, J.}

By means of filing this petition under Article 227 of the Constitution of India, the petitioner has prayed to quash and set aside the order dated November

28th, 1997, rendered by the Customs Excise and Gold (Control) Appellate Tribunal (The Tribunal' for short), New Delhi, in C/ROM/77/97-NB(DB) in Appeal No.C/17/97-NB(DB), by which order dated 24th April, 1997, passed by the Tribunal in Appeal No.C/70/97 of 1997 is recalled and the case is again ordered to be listed for hearing.

2. The petitioner is sole proprietor of M/s. Sunder Brej Ayurvedic Pharmacy, Meerut, Uttar Pradesh and manufactures various Unani and Ayurvedic medicines. The petitioner had imported 151.060 tons Poppy Seeds of Pakistani origin, at CFS, Adalaj, for which seven Bills of Entry dated 10.10.95, 8.11.95 and 12.1.96 were filed by M/s. Jasvant B. Shah, Ahmedabad, who was Custom House Agent of the importer. Clearance of the goods imported was sought under OGL on the ground that the Poopy Seed is a "Diabetic Food". A show-cause-notice was issued to the petitioner as to why the goods imported should not be confiscated. The petitioner filed reply to the said show-cause-notice. The Commissioner of Customs (Preventive) Ahmedabad, by an order dated 24th January, 1997, confiscated the consignment of Poopy Seeds as he was of the opinion that the petitioner had violated the provisions of the Foreign Trade (Development and Regulation) Act, 1992 read with Clause 3 of the Import (Control) order, 1955 and Section 11 of the Customs Act, 1962. However, the adjudicating authority gave to the petitioner an option to pay, in lieu of confiscation, fine of Rs.50 lakhs and also imposed penalty of Rs.10,000,00/-. Feeling aggrieved by the said order, the petitioner preferred an appeal before the Tribunal, New Delhi. The Tribunal by an order dated 24th April, 1997, confirmed the order of confiscation and imposition of penalty but reduced the fine to Rs.15 lakhs and allowed the goods to be redeemed on the basis of individual bill of entry. The above referred to order was passed as the Tribunal was of the opinion that, no evidence was produced by the department to indicate that identical goods were being sold at Rs.50/- to Rs.60/- per k.g. in the market so as to justify the fine of Rs.50 lakhs. In fact, sufficient evidence was produced before the adjudicating authority to establish that similar goods were being disposed of at the rate of Rs.50 to Rs.60 per k.g. in the market and therefore determination of fine was justified. Under the circumstances, the respondents preferred Rectification of Mistake Application under the provisions of Section 129-B (2) of the Customs Act, 1962, requesting the Tribunal to reconsider the matter after correcting the mistake. The Tribunal, by an order dated November 28th, 1997, has allowed the application and

directed the case to be listed for hearing before it giving rise to the present petition. The order passed by the Tribunal in Rectification Application is produced by the petitioner at Annexure `E' to the petition. The petitioner has averred in the petition that the Tribunal has no power to recall or review its earlier order, and therefore, the impugned order deserves to be set aside. It is pleaded that no ground was made out by the respondents for amendment in the order as contemplated by Section 129-B(2) of the Customs Act, 1962, and therefore, the Rectification Application submitted by the respondents ought to have been dismissed by the Tribunal. Under the circumstances, the petitioner has filed the present petition and claimed relief to which reference is made earlier.

3. Mr. Hitendra Kapoor, learned counsel for the petitioner submitted that the Tribunal has no power either to recall or review the earlier order passed by it, and as the impugned order is passed without jurisdiction the petition should be accepted. It was stressed that the remedy of the respondents was to file an appeal against the order reducing fine but as the Tribunal has no power to review its earlier order, application for rectification filed by the respondents could not have been allowed by the Tribunal. In the alternative, it was claimed that there was no mistake apparent on the face of the record, and therefore, the earlier order passed, reducing the fine should not have been reviewed by the Tribunal. In support of his submissions, learned counsel placed reliance on the decisions rendered in the cases of (1) Madhusudan Gordhandas & Company V/s. Collector of Customs, Bombay 1987 (29) ELT 904 (Tribunal). (2) Jayhind Oil Mills Company V/s. Collector of Customs, Bombay 1987 (28) ELT 305 (Tribunal). (3) Satyanarayan Laxminarayan Hegde and others V/s. Mallika Arjun B. Tirimela - AIR 1960 Supreme Court 137. (4) A.T. Sharma V/s. A.P. Sharma and Others AIR 1979 Supreme Court 1047. (5) Parsion Devi and Others V/s. Sumitri Devi and Others - 1997 Supreme Appeals Reporter (Civil) Supreme Court 889. and (6) Deeasha Suri V. Income Tax Appellate Tribunal 1997(VI) A.D. Delhi 912.

4. Mr. J.D. Ajmera, learned counsel for the respondents contended that apart from powers conferred by Section 129-B (2) of the Customs Act, inherent power of review is available to the Tribunal for doing complete justice between the parties and as the Tribunal has rectified mistake committed by it while passing order dated April 24th, 1997, the petition should not be

allowed. It was pleaded that the impugned order itself indicates that the Tribunal had committed a mistake apparent on the face of the record and as the Tribunal has directed the matter to be listed before it for hearing, the court should not interfere with the impugned order. In support of his submissions, learned counsel has placed reliance on the decisions rendered in the cases of J.K. Synthetics Limited V/s. Collector of Central Excise 1996 (6) Supreme Court Cases 92, (2) Smt. Prativa Rani Samanta V/s. Collector of Central Excise Calcutta 1984 (50) ELT 482 (Tribunal).

5. In view of the rival submissions advanced at the Bar, it would be relevant to notice provisions of Section 129-B of the Customs Act, 1962 which read as under:

(1) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may thinks fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

(2) The Appellate Tribunal may, at any time within four years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the Collector or the other party to the appeal:

Provided that an amendment which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the other party shall not be made under this sub-section, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(3) The Appellate Tribunal shall send a copy of every order passed under this section to the Collector of Customs and the other party to the appeal.

(4) Save as otherwise provided in Section 130 or Section 130-E, orders passed by the Appellate Tribunal on appeal shall be final.

A bare reading of the section makes it apparently clear that the Appellate Tribunal has power to rectify any

mistake which is apparent from the record and amend any order passed by it under sub-section 129-B(1) of the Customs Act. The manner in which sub-section 2 is couched makes it evident that it is the duty of the Tribunal to make necessary amendments if the mistake is brought to its notice either by the Collector or by party to the appeal. The only limitation placed on the power to amend the order is that without giving opportunity of being heard, to the affected party, order cannot be amended so as to enhance the assessment or reduce the refund or otherwise increase the liability of party concerned. Here in this case, the petitioner was heard before passing the impugned order and the order has not the effect of enhancing the assessment or reducing the refund or otherwise increasing the liability of the petitioner as the matter is going to be reheard by the Tribunal. In the case of Madhusudan Gordhandas and Company (supra), the Tribunal has taken the view that the Tribunal is not empowered to review its own order as the power of review is not specifically conferred by the statue. What is emphasised by the Tribunal is that the Tribunal has merely power to clarify its earlier order, but, while exercising its power, the Tribunal cannot rectify the errors apparent from the record. Again in the case of Jaihind Oil Mills Company (Supra), the Tribunal has held that, "once the order has been pronounced or communicated, there is no question of recalling the same and all that can be done by the Tribunal is to amend the order with a view to rectify any mistake apparent from the record, in terms of Section 129-B (2) of the Customs Act, 1962." What is highlighted by the Tribunal in the said decision is that, if there is a mistake apparent from the record, the order can be merely amended without being recalled or withdrawn or set aside. The Supreme Court in the case of Satyanarayan Laxminarayan Hegde and others (Supra) has ruled that though the power available to the High Court under Article 227 of the Constitution is wider than the power available under Section 115 of the Code, theo High Court cannot assume appellate powers to correct every mistake of law and even if decision is erroneous, the same cannot be corrected by the High Court in revision under Section 115 of the Code of Civil Procedure or under Article 227 of the Constitution. The Apex Court in the case of A.T. Sharma (supra), has explained the scope of power of review and observed that "it is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenacy jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits

to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court." In the case of Parsion Devi and others (supra), the Supreme court has interpreted the provisions of Order 47 Rule 1 C.P.C. and ruled that review proceedings should not be treated as if an appeal has been filed against the impugned order. What is emphasised therein is that an error which is not self-evident and has to be decided by process of reasoning should not be corrected under the provisions of Order 47 Rule 1 of C.P.C. Similarly in case of Deeasha Suri (Supra) the Delhi High Court has construed Section 254(2) of the Income Tax Act and held that Section 254(2) which empowers the Tribunal to rectify any error apparent from the record does not confer power to rehear matter on merits.

6. In our view, the decisions relied upon by the learned counsel for the petitioner are not applicable to the facts of the present case, and therefore of no assistance to the petitioner. As a general rule, a judgment, decree or final order once drawn up and signed, cannot subsequently be altered, varied or amended in any manner by the Court or Tribunal which pronounced it. However, there is well recognised exception to the said general rule. It is a maxim of law that an act of a Court shall prejudice no man actus curiae neminem gravabit. Every Tribunal has an inherent jurisdiction, apart from statutory jurisdiction to correct any error committed by itself. It can invoke such jurisdiction and can exercise it in an appropriate case when its conscience is aroused and if it considers that without the exercise of such powers, the ends of justice would be frustrated. The whole jurisdiction of the Tribunal is to pass a just order in the larger interest so that justice is done both to the assessee and the revenue. It would be instructive to notice Rule 41 of the Customs Excise and Gold (Control) Appellate Tribunal (Procedure) Rules 1982 which is as under:

"The Tribunal as may make such orders or give such directions as may be necessary or expedient

to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice."

By enacting Rule 41 of the Customs Excise and Gold (Control) Appellate Tribunal (Procedure) Rules 1982, the legislature has advisedly invested the Tribunal with a very wide jurisdiction to do complete justice between the parties. In Grindlays Bank Ltd. V/s. Central Government Industrial Tribunal And Others, 1980 (supplement) Supreme Court Cases 420, the Supreme Court considered the question as to whether the Tribunal constituted under the provisions of Industrial Disputes Act, has power to set aside an ex-parte order in absence of express provisions in the Act or the Rules framed thereunder or not. The Supreme Court has held that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. The Supreme Court found that there was no express provision in the Act or rules framed thereunder giving the Tribunal jurisdiction to set aside its ex-parte award and even then it has been held that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statue to the contrary. After examining the meaning of word "review", it has been held therein that the expression "review" is used in the two distinct senses, namely, (1) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. The Supreme Court has further held that, when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debeito justitiae to prevent the abuse of its process, and such power inheres in every Court or Tribunal. The principle that the power to review must be conferred by statute either specially or by necessary implication is inapplicable to decisions of Judicial Tribunal which is supposed to do complete justice to the parties before it. To extend the principle to decisions rendered by a Judicial Tribunal would indeed lead to untoward and startling results. Surely any Judicial Tribunal must be free to review its decision if it has to dispense justice to the parties though of course principles of fair play should be observed. The law on the subject has been reviewed and restated by the Supreme Court in its judgment rendered in the case of S. Nagaraj and Others Vs. State of

Karnataka and Another., JT 1993 (5) SC, 27. In para 18 of the judgment, the Supreme Court has held as under:

> "Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be prejudiced from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order."

In para 19 of the said judgment, the Supreme Court has further observed as under:

> "Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithvi Chand Lal Choudhury V. Sukhraj Rai and Others, AIR

1941 Federal Court 1, the Court observed that even though no rules had been framed permitting the highest court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae V. Bijai Govind Singh 1 Moo PC 117 that an order made by the Court was final and could not be altered.

"Nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess by Common law, the same power which the Courts of record and statute have of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced; or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

"Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality."

Thus, it becomes clear that the uppermost anxiety in the mind of the court should be to do complete justice between the parties and when the court finds that the mistake has crept in inadvertently, it is duty of the Court or Tribunal to correct it for doing complete justice between the parties. In view of the principle laid down by the Supreme Court in the above quoted decisions, we are of the opinion that, the power of

review is available to the Tribunal and it cannot be said that the order passed by the Tribunal is without jurisdiction. Again in the case of J.K. Synthetics Limited (Supra), the respondent was unable to appear before the Tribunal for no fault of his own. The ends of justice clearly required that the ex-parte order passed against him should have been set aside. However, the Tribunal refused to set aside the ex-parte order passed on merits holding that Rule 21 of Customs Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 which empowers the Tribunal to hear appellant ex-parte did not expressly state that an order on an appeal heard and disposed of ex-parte could be set aside by cause being shown by the respondent. The Supreme Court has construed the provisions of Rules 20, 21 and 41 of the Customs Excise and Gold (Control) Appellate Tribunal (Procedure) Rules 1982 and held that, the Tribunal is clothed with express power under the Customs Excise & Gold Appellate Tribunal (Procedure) Rules to make such order as is necessary to secure the ends of justice and the Tribunal has, therefore, the power to set aside an order passed ex-parte against a party before it if it is found that the party had, for sufficient cause, been unable to appear. It is further observed that the fact that Rule 21 does not expressly state that an order passed in an appeal heard and disposed of ex-parte can be set aside on sufficient cause for the absence of the respondent being shown does not mean the Tribunal has no power to do so. What is stressed by the Apex Court is that quite apart from the inherent power that every tribunal or court to do justice has, if it is established to the satisfaction of the Tribunal that there was sufficient cause, the Tribunal must set aside the ex-parte order, restore the appeal to its file and hear it afresh on merits. In view of the principle laid down by the Supreme Court in the above noted decision, there is no manner of doubt that power to recall or review its earlier order is available to the Tribunal for doing complete justice between the parties and the impugned order cannot be regarded as having been rendered without jurisdiction.

7. The contention that there was no error apparent on the face of the record committed by the Tribunal while passing order dated April 24th, 1997, and therefore, rectification application ought to have been dismissed has no substance at all. In the Rectification Application, it was specifically pleaded by the respondent that a mistake had crept in, in Para 3 of the judgment dated April 24, 1997, wherein, it was stated by the Tribunal that no evidence had been produced by the

department indicating that identical goods were being sold at Rs.50/- or Rs.60/- per k.g. in the market. The Tribunal after perusing the order has found that the observation made by the Tribunal in its order dated April 24th, 1997, was not in conformity with the facts and evidence discussed by adjudicating authority in the order in original. Under the circumstances, the Tribunal has recalled its earlier order by holding that the mistake had crept in while passing the order on April 24th, 1997. Having regard to the facts and circumstances of the case, it cannot be said that the error which is noticed by the Tribunal is not self-evident and could have been decided only by process of reasoning. This is a case of procedural review which is inherent or in any view of the matter implied in the Tribunal to set aside palpably erroneous order passed under a misapprehension by it. The Tribunal has found that the order recalled was passed under a mistake. The reasonable reading of the impugned order indicates that the Tribunal would not have exercised jurisdiction in favour of the petitioner, but for the erroneous assumption which in fact did not exist. The power of review which inheres in every Court or Tribunal of plenary jurisdiction is exercised by the Tribunal to prevent miscarriage of justice and to correct grave and palpable error committed by it. It is exercised to secure the ends of justice within meaning of Rule 41 of the Custom Excise and Gold (Control) Appellate Tribunal (Procedure) Rules 1982. It is not exercised on the ground that the decision recalled was erroneous on merits. We are of the view that the Tribunal has not confused its power to review its earlier order with appellate power. Though in the case of A.T. Sharma (supra) Supreme Court has held that powers of review available to High Court under Article 226 of the Constitution, are analogous to provisions of Order 41 Rule 1 CPC, in earlier decision rendered in the case of Shivdeo Singh V. State of Punjab - A.I.R. 1963 Supreme Court 1909, the Constitution Bench of Apex Court has defined powers of review available to the High Court under Article 226 of the Constitution and ruled that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inhers in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. Even in subsequent decision i.e. in case of Grindlays Bank Ltd. (supra), the Apex Court has explained that the expression "review" is used in the two distinct senses namely (1) a procedural review which is either inherent or implied in a Court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it and (2) a

review on merits when the error sought to be corrected is one of law and is apparent on the fact of the record. As held earlier, this is a case of procedural review and not a case of review on merits where error of law apparent on the face of the record is sought to be corrected. Therefore decision rendered in case of A.T. Sharma (Supra) cannot be made applicable to the facts of the present case. Similarly, though provisions of Section 254(2) of the Income Tax Act and Section 129-B(2) of the Customs Act are similar, we are unable to persuade ourselves to follow decision of the Delhi High Court rendered in case of Deeasha Suri (Supra) because principles of law laid down by the Apex Court in case of Grindlays Bank Ltd. (Supra) and S. Nagaraj and Others (Supra) are not taken into consideration by Delhi High Court while interpreting Section 254(2) of the Income Tax Act. Even otherwise said decision has persuasive value and not binding on this court. On perusal of the order dated April 24th, 1997, itself the Tribunal noticed that the finding recorded against the respondent by the Tribunal was not in conformity with the facts and evidence on record, and therefore, it cannot be said that an error is committed by the Tribunal in recalling its earlier order necessitating interference of the Court under Article 227 of the Constitution of India. As held in Nilkanth V. State of Bihar A.I.R. 1962 Supreme Court 1135, the power under Article 227 is exercised by the court in its discretion and cannot be claimed as of right by any party. Therefore even if one agrees with the submission of the petitioner that the Tribunal has no jurisdiction to recall or review its earlier order, the impugned decision cannot be interfered with on a merely technical ground which does not advance substantial justice. Under the circumstances, we are of the opinion, that no case is made out by the petitioner for interfering with the impugned order, and the petition is liable to be dismissed.

8. For the foregoing reasons, the petition fails and is dismissed. Rule is discharged with no order as to costs. Ad-interim relief granted earlier is hereby vacated.

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